The rules of pleading require from a plaintiff, as a pre-requisite to a judgment in his behalf, an allegation that he has suffered damage, together with his estimate as to the extent thereof. Conceding that this declaration furnishes foundation for the inference that the plaintiff has been injured to the extent of the money paid out, yet the pleader has not averred such to be the fact in language of which the court can take notice. Upon this point nothing is to be left to inference. Saying that the plaintiff has paid a sum of money which it was the duty of the defendant to pay, is not in pleading the equivalent for an allegation that he has suffered damage to a specified amount.

It is true that the sum named in the *ad damnum* clause is not that for which, if for any sum, the plaintiff is of necessity to have a judgment; it is subject to modification by a specific statement in the declaration, or by a bill of particulars filed by order of court; but in the total absence of the clause the plaintiff has failed to ask the court for a judgment for any sum; he has failed to aver that he has suffered a wrong which it is within the jurisdiction of the Court of Common Pleas to redress. There is no living thing into which to graft an amendment; he has failed to be in court at all.

There is no error in the judgment.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ERRORS OF CONNECTICUT.[1]
ENGLISH COURTS OF COMMON LAW AND EQUITY.[2]
SUPREME COURT OF ILLINOIS.[3]
SUPREME COURT OF IOWA.[4]
SUPREME COURT OF PENNSYLVANIA.[5]

ACTION.

Pleadings against Person in one capacity, and Proof against him in another.—The defendant had been factorized as an executor, the debt attached being a legacy given by the will. Judgment having been ob-

[1] From John Hooker, Esq., Reporter; to appear in 47 Conn. Reports.
[2] Selected from late numbers of the Law Reports.
[3] From Hon. N. L. Freeman, Reporter; to appear in 96 Illinois Reports.
[4] From Hon. John S. Runnells, Reporter; to appear in 52 Iowa Reports.
[5] From A. Wilson Norris, Esq., Reporter; to appear in 90 Penn. St. Reports.

tained in the suit, and the defendant not paying as garnishee on demand, the plaintiff brought a writ of *scire facias* against him in his individual capacity, and making demand on him only in that capacity, but setting out the factorizing proceedings in the declaratory part of the writ. The defendant pleaded the general issue, with notice that he should offer evidence of certain facts with regard to the condition of the estate. *Held:*

1. That judgment could not be rendered against the defendant in his individual capacity, because the facts alleged did not show a liability in that capacity.

2. That judgment could not be rendered against him as an executor, because he was sued only in his individual capacity.

3. That the notice given under the general issue, of matters pertaining only to his liability as executor, was not sufficient to warrant a judgment against him as executor: *Middlebrook* v. *Pendleton*, 47 Conn.

AGENT.

Ratification—Promissory Note.—A principal who accepts and attempts to enforce a note taken in his name by an assumed agent cannot deny the agency of the latter in the transaction out of which the note grew: *Farrar & Wheeler* v. *Peterson*, 52 Iowa.

ASSIGNMENT. See *Bills and Notes.*

BILLS AND NOTES. See *Agent; Husband and Wife.*

Draft—Assignment of Fund—Intention.—A bill of exchange drawn upon a general fund, and not accepted by the drawee, does not operate as an assignment of the fund, but is merely evidence to be considered with other circumstances in determining the intention of the parties: *First Nat. Bank of Canton* v. *Dubuque Southwestern Railway Co.*, 52 Iowa.

Evidence considered and held insufficient to show that a draft was intended as an assignment to the holder of a fund subsequently coming into the hands of the drawee: *Id.*

CONSTITUTIONAL LAW.

Eminent Domain—Mode of taking Property.—The mode of taking private property for public use by municipal corporations is in the control of the legislature, subject only to the limitations of the constitution: *Bachler's Appeal; In re Opening of Walnut Street*, 90 Penn. St.

Section 8, article 16, of the Constitution secures an appeal and trial by jury for damages, wherever private property is taken by a municipal corporation for public use, and the Act of June 13th 1874, furnishes the remedy thus secured to owners where no sufficient provision for trial by jury already existed: *Id.*

CONTEMPT.

Sufficiency of Judgment—Power to review Judgment of Committal—Habeas Corpus.—A judgment or order of court, that a defendant stand committed to the county jail until the further order of the court, and awarding a *mittimus* for that purpose, for a contempt in refusing to obey a previous order of the court that he surrender books, &c., in his hands as receiver, to his successor, is illegal and void, and will not justify the imprisonment of the defendant: *The People, ex rel. Hinkley* v. *Pirfenbrink*, 96 Ills.

If a committal for a contempt of court is for a definite period, or until the defendant shall perform a specified act, the judgment will be capable of being reviewed on error, but when the order of commitment is until the further order of the court, the appellate court cannot know the duration of the imprisonment and determine whether the confinement is reasonable, or is oppressive and wrong: *Id.*

If an order of commitment for a contempt of court is simply erroneous, this court has no power to discharge the prisoner on *habeas corpus*. In such case error or appeal is the only remedy, but it is otherwise when the judgment and process are void: *Id.*

Thus, where an order and *mittimus* for the imprisonment of a party were not for any definite period, or until he should perform some act required of him, it was held, that the order and process were too indefinite, and were void, and the prisoner was discharged: *Id.*

All judgments must be specific and certain. They must determine the rights recovered or the penalties imposed, and be such as the defendant may readily understand and be capable of performing: *Id.*

CONTRACT.

Illegal Consideration—Compounding Criminal Offence.—A man having been arrested and lodged in jail upon a criminal prosecution against himself and his son, for obtaining goods under false pretences, his wife agreed with the parties from whom the goods were obtained and who had procured the prosecution, that she would give a note with her husband for the value of the goods and for the costs made, and secure it by a mortgage of her real estate, if they would procure the abandonment of the criminal proceeding and the release of her husband. The note and mortgage were given and the prosecution was withdrawn. *Held*, on a bill to foreclose the mortgage, that a court of equity would not enforce a contract of suretyship so procured. The note was void as being upon an illegal consideration: *McMahon* v. *Smith*, 47 Conn.

To render such an agreement void it is not necessary that the crime compounded should be a felony. It is enough if it be a public offence: *Id.*

CORPORATION.

Powers to Contract—Ultra Vires.—The doctrine of *ultra vires* as explained in *The Asbury Railway Co.* v. *Riche*, Law Rep., 7 H. L. 63, is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the legislature has authorized by an Act of Parliament, ought not (unless expressly prohibited) to be held as *ultra vires: Attorney-General* v. *Great Eastern Railway Co.*, Law Rep., 5 App. Cases.

In an act granting special powers, what is not permitted is prohibited: *Id.*

Subscription to Stock—Cash Payment—Conditional Subscriptions before Charter.—Where an act provides that where subscriptions are made to the capital stock of a railway company, previous to the issue of letters patent, no subscription shall be valid, unless the party making the same shall, at the time of subscribing, pay $5 on each and every share for the use of the company. *Held*, that giving a note for a subscription was not a payment within the meaning of the law: *Boyd* v. *Peach Bottom Railway Co.* 90 Penn. St.

Held, further, that such a subscriber, who had taken no other part in the affairs of the company, was not estopped from setting up the absence of such payment as a defence to an action of assumpsit for the subscription: *Id.*

A subscription to the stock of a public corporation, made before letters patent are issued and an organization effected, must be considered absolute and unqualified, and any condition attached thereto is void. Commissioners have no authority to raise conditional subscriptions. If they do, the subscription is valid and binding, and the condition null and void: *Id.*

CRIMINAL LAW. See *Contract.*

Evidence—Judicial Notice of Time of Sunset—Almanac—Burglary.—Upon a trial for burglary, the state was allowed to introduce an almanac for the purpose of showing when the sun set on the day on which the crime was committed. *Held* to be no error. The matter was one of which the court would have taken judicial notice, and the almanac was received, not strictly as evidence, but to refresh the memory of the court and jury: *State* v. *Morris*, 47 Conn.

It will not avail a prisoner on a charge of burglary that there was light enough from the moon, street-lights, and lights of buildings, aided by newly-fallen snow, to enable one person to discern the features of another. There must have been daylight enough left for the purpose: *Id.*

Where the crime charged was burglary committed by the prisoner when so armed as to indicate violent intentions, it was *held* that the fact that the prisoner was so armed when he left the house where the burglary was committed, was sufficient evidence to justify the jury in finding that he was so armed when he committed the crime: *Id.*

DEBTOR AND CREDITOR. See *Surety.*

DRAFT. See *Bills and Notes.*

EQUITY. See *Contract.*

Pleading—Allegations and Proof—Material Allegations only need be Proved.—It is not essential to support a decree in favor of a complainant that all the allegations of the bill be proved precisely as charged. All that the law requires is that the material allegations shall be substantially proved: *Allen et al.* v. *Woodruff et al*, 96 Ill.

If the actual facts are stated correctly in a bill, which is all the law requires, allegations in respect to what the pleader supposes to be the legal effect of such facts, which proves entirely erroneous, will not conclude or prejudice the complainant. His rights depend upon the actual facts stated, and not upon the erroneous conclusions of the pleader with respect to them: *Id.*

Where the actual facts are correctly stated in a bill and proved, it is the duty of the court to render such decree and grant such relief as the law requires from such facts, without regard to the theory of the pleader in framing the bill; *Id.*

EVIDENCE. See *Criminal Law; Husband and Wife.*

FIXTURES.

Bill of Sale—Mortgage of Stone Quarry.—Tramways and Steam

Crane.—By a deed of mortgage of a stone quarry the quarry was granted, together with the mills, buildings, steam engines, motive power, plant, fixed and moveable machinery, apparatus, rails, sleepers, implements, fittings, and fixtures of every description, then or at any time thereafter fixed to, or placed upon the hereditaments; all in the same witnessing part. At the date of the mortgage there was a tramway in the quarry, and there was also a steam crane, cramped on to large stones, and kept in position by two guys. *Held*, that the tramway and crane were fixtures, and that the mortgage did not require registration either under the Bills of Sale Act, in order to give the mortgagee the right to retain the tramways and crane as part of his security, as against a liquidation trustee: *Ex parte Moore & Robinson's Banking Co., In re Armytage*, Law Rep., 14 Chan. Div.

FRAUDS, STATUTE OF.

Express Trusts.—In all cases where a deed or other instrument of conveyance is absolute on its face, and the grantor or his assignee seeks to defeat its operation by showing that the deed, though absolute in form, was, in fact, executed upon certain express trusts, the grantee may invoke the protection of the Statute of Frauds by requiring proof of these alleged trusts to be made in writing; but the statute was not enacted for the benefit of those seeking to defeat the operation of such deeds by showing that they were made upon trusts not appearing upon their face—only for those claiming title under them: *Allen* v. *Woodruff*, 96 Ill.

GARNISHMENT. See *Judgment.*

GROWING CROPS. See *Real and Personal Property.*

HABEAS CORPUS. See *Contempt.*

HIGHWAY. See *Municipal Corporation.*

HUSBAND AND WIFE.

Married Woman's Note—Must be shown to be within the Statute Authorizing her to Contract—Declarations of Husband.—Where a married woman has signed a note with her husband, it will not be presumed, but must be shown, that the circumstances were such as to bring the case within the statute making married women liable upon their contracts: *Way* v. *Peck et al.*, 47 Conn.

The declarations of the husband at the time the loan was made, as to the object for which the money was borrowed, made to the lender, but in the absence of the wife and without her authority, held not to be binding on her: *Id.*

The fact that a part of the money loaned was deposited by the husband in a bank to the credit of the wife, and drawn out by her in payment of bills for an addition to her house, though significant as evidence that the loan was obtained for the benefit of herself or her estate, yet held not to be equivalent to a finding that it was so in fact: *Id.*

INSURANCE.

Mutual—Surrender of Policy.—The by-laws of a mutual insurance company provided that the liability of a member should continue, until

the cancellation of his policy and the erasure of his name from the books of the company. *Held*, that the company was relieved from liability for a loss by fire after a voluntary surrender of his policy by a holder, without a formal cancellation of the same and the erasure of his name from the books of the company: *Farmers' Mutual Ins. Co.* v. *Wenger*, 90 Penn. St.

INTEREST.

Mortgage of Reversionary Interests—Covenant for Compound Interest—Interest Capitalized.—A. and B., reversioners after a life-interest in C., mortgaged their property and covenanted that interest in arrear should be capitalized, and bear interest after the same rate; and C. also assigned her life-interest as part of the security. *Held*, that the covenant was good and valid; and that the mortgagee was not limited to six years' interest: *Clarkson* v. *Henderson*, Law Rep., 14 Chan. Div.

JUDGMENT. See *Contempt.*

Purchase of by Surety on Injunction Bond—Garnishment.—A surety upon an injunction bond, to restrain the collection of a judgment, is not a party to the judgment in such sense that he cannot purchase it after the injunction is dissolved, and an assignment thereof to him will not operate as a payment and release the property of the judgment debtor from the lien of the judgment, though the surety took indemnity when he signed the bond: *Davis* v. *Wilson et al.*, 52 Iowa.

A surety upon an injunction bond who took as indemnity a bill of sale of certain chattels, was garnished under an attachment against his principal. *Held*, that such attachment was valid and gave the creditor a lien upon the proceeds of the property after indemnifying the surety. It was not essential to the validity of the attachment that it should appear that the debtor had no other property subject to attachment, or that he was insolvent: *Id.*

LACHES. See *Surety.*

MORTGAGE. See *Fixtures.*

MUNICIPAL CORPORATION.

Defective Highway—Injury to Traveller—Negligence—Damages.—The limit of duty on the part of a town with regard to the condition of its highways, falls far short of making them absolutely safe under all circumstances, even for those who use them properly. And where the use is one that reasonable care and prudence could never have anticipated there is no duty on the town at all in reference to it: *Wilson* v. *Granby*, 47 Conn.

And it makes no difference that the injury in such a case is the result of defects in a highway for which a town would be responsible in case of injury to individuals in the lawful and proper use of it: *Id.*

Damages for an injury from a defect in a highway should be compensatory merely, unless the jury should find gross negligence on the part of the town, in which case they may increase the amount by considering the expenses of the plaintiff's suit, not including the taxable costs: *Id.*

NEGLIGENCE. See *Municipal Corporation.*

PARTNERSHIP.

Settlement—Impeachment of.—Where there has been an accounting between partners, and neither fraud nor mistake affecting the whole account as stated is shown, such account will be deemed correct except as to such specific items as can be shown to be erroneous by the party seeking to impeach the settlement: *Hunter* v. *Aldrich, et al.*, 52 Iowa.

Facts considered and held to render the books of account of a partnership admissible in evidence in an action between the partners: *Id.*

PLEADING. See *Equity.*

RAILROAD.

Right of Way—Trespass.—A railway company which occupies with its track, land over which it has not acquired the right of way is a mere trespasser, and the purchaser of the land after such occupation may maintain an action to recover the value of the land appropriated, and the damages occasioned by the trespass since his purchase: *Donald* v. *St. L., K., C. & N. R. Co.*, 52 Iowa.

REAL AND PERSONAL ESTATE.

Growing Crops—Severance.—The purchaser of land at sheriff's sale is entitled to the growing grain thereon which had not been severed before a sale. If there has been a severance it does not pass to him who purchases the land subsequent to the severance: *Hershey et al.* v. *Metzgar and Krug*, 90 Penn. St.

The plaintiffs conveyed a farm to defendant and took a judgment for part of the purchase-money. They issued a *fi. fa.* thereon and levied on the real and personal estate. Defendant claimed his exemption and elected to take the growing grain, which was duly appraised in the presence of one of plaintiffs. The land was subsequently purchased by the plaintiffs, who claimed that the growing grain passed to them. *Held*, that the appraisement under these circumstances was a severance of the grain and that plaintiffs were not entitled thereto: *Id.*

SALE.

Conditional—Estoppel of Vendor as against Vendee's Creditors.—The attorney of W. sold the one-half of a printing establishment and newspaper to C., who at the time of the sale owned the other half. C. placed his name at the head of the paper as sole owner and assumed exclusive possession and control thereof. The sale was made on condition that a part of the purchase-money should be paid in cash and the balance in instalments. Before these instalments were all paid the property was sold at sheriff's sale and bought by M., a creditor of C. No claim to the property was made by W. at the time of the sale. There was some evidence that C. had agreed to rescind the contract of sale, which C. denied. The latter also at the time of the sale informed M. that he owned the property. W. filed a bill in equity to compel M to account. *Held*, that it would not lie: *Wylie's Appeal*, 90 Penn. St.

Held, further, that under these circumstances the creditors of C. would be led to believe that C.'s title was absolute and unconditional

and that W. was estopped from setting up the conditions of the sale to defeat that title in a contest with *bona fide* creditors: *Id.*

SHIPPING.

Deviation.—Charter-party.—A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property. The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the Arion, and the master, in consideration of 1000*l.*, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. The jury found that it was not reasonably necessary to take the Arion to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her and her cargo. *Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover the value of the cargo against the defendants as owners of the ship: *Scaramanga* v. *Stamp*, Law. Rep., 5 C. P. Div.

SURETY. See *Judgment.*

Laches of Creditor.—A., as principal, and B., as surety, executed and delivered a bond to C. for $2000. Judgment was entered thereon in 1862. In 1866 the amount of the judgment was paid to C., which payment was made by A. appropriating moneys in his hands belonging to his sisters-in-law. An assignment to them of the sum thus appropriated was endorsed on the bond, but the judgment was never marked to their use, nor was the assignment filed. It did not appear affirmatively that the sisters ever had possession of the bond, or that they knew that it had been assigned to them. For some unexplained reason, in 1866, the judgment was satisfied by C. The record thus remained until 1877, when it was revived by an amicable *scire facias* signed only by A., who, having become embarrassed, made an assignment for the benefit of creditors the following day. In 1878, in a *scire facias* on the judgment, the sisters sought to recover from B., the surety. There was evidence that he was misled by the record. *Held*, that as they had made no inquiry as to the disposition of their money for eleven years, asserted no claim to the judgment and given no notice to the surety, who was excused from vigilance by the action of C. and A., they could not call on B. to make good the loss which, in legal contemplation, was the consequence of their own default: *Buffington, to use of Mitchell*, v. *Bernard and Hopes*, 90 Penn. St.

TOWN. See *Municipal Corporation.*

TRESPASS. See *Railroad.*

TRUST. See *Frauds, Statute of.*

ULTRA VIRES. See *Corporation.*

USURY. See *Interest.*